

## Message Text

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ACTION EUR-12

INFO OCT-01 IO-10 ISO-00 EURE-00 AID-05 CEA-01 CIAE-00

COME-00 EB-04 EA-06 FRB-01 INR-05 NEA-06 NSAE-00

RSC-01 OPIC-03 SP-02 TRSE-00 CIEP-01 LAB-01 SIL-01

SWF-01 OMB-01 SSO-00 INRE-00 L-02 SS-15 NSC-05 NSCE-00

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FM USMISSION OECD PARIS

TO SECSTATE WASH DC IMMEDIATE 4288

USMISSION GENEVA PRIORITY

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GENEVA ATTN: FRANK WILLIS

E.O. 11652: N/A

TAGS: EFIN, OECD

SUBJECT: INVISIBLES COMMITTEE DISCUSSION OF UN LINER  
CODE

REF: OECD DOC. DAF/INV/74.46, 1ST REVISION

SUMMARY: SECRETARIAT HAS CIRCULATED ENTIRELY NEW VERSION OF CHAPTER IV REF DOC FOR CONSIDERATION BY INVISIBLES COMMITTEE WORKING PARTY ON FRIDAY NOVEMBER 15. THIS DOCUMENT SEEKS TO AVOID MAJORITY AND MINORITY VIEWS IN ORDER TO ARRIVE AT AGREED CONCLUSIONS FOR TRANSMISSION TO COUNCIL. ACTION REQUESTED: DEPARTMENT'S VIEWS BY OPENING OF BUSINESS NOVEMBER 15.

1. SECRETARIAT VERSION FOLLOWS IN ENTIRETY:

IV. THE QUESTION OF THE COMPATIBILITY OF THE PROVISIONS  
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OF THE O.E.C.D. CODE AND THE UNITED NATIONS CONVENTION

(1) THE ISSUE OF COMPATIBILITY DOES NOT ARISE FROM THE NATURE OR SEVERITY OF RESTRICTIVE PRACTICES OF LINER CONFERENCES WHICH ARE STIPULATED BY THE UNITED NATIONS CONVENTION--THESE NEED NOT NECESSARILY BE MORE STRINGENT OR DISCRIMINATORY THAN THEY HAVE BEEN HITHERTO UNDER THE EXISTING LINER CONFERENCE SYSTEM. THE QUESTION IS RATHER WHETHER, AS HERETOFORE, UNDER THE UNITED NATIONS CONVENTION SUCH RESTRICTIVE PRACTICES WILL CONTINUE TO BE APPLIED ONLY TO THE EXTENT THAT THEY ARE FREELY AGREED UPON BY THE MEMBERS OF THE CONFERENCES OR WHETHER, FAILING SUCH AGREEMENT, THE CONTRACTING PARTIES WILL INFUTURE BE OBLIGED TO IMPOSE BY GOVERNMENTAL ACTION RESTRICTIONS ON LIBERALISATION OF A KIND NOT PERMITTED UNDER THE O.E.C.D. CODE.

(2) IN OTHER WORDS: DOES A CONFLICT BETWEEN THE TWO INSTRUMENTS ARISE BECAUSE THE UNITED NATIONS CONVENTION COMMITS CONTRACTING PARTIES TO TAKE ANY OF THE GOVERNMENTAL ACTION WHICH UNDER THE LIBERALISATION PROVISIONS OF THE O.E.C.D. CODE MEMBER COUNTRIES OF THE O.E.C.D. ARE COMMITTED NOT TO TAKE, SUCH AS THE WITHHOLDING OF AUTHORIZATION OF TRANSACTIONS BETWEEN RESIDENTS OF DIFFERENT MEMBER COUNTRIES OR HAMPERING MEASURES OF THE KIND SET FORTH IN NOTE 1?

(3) THE ANSWER CAN ONLY BE FOUND ON THE BASIS OF AN AUTHORITATIVE INTERPRETATION OF CERTAIN PROVISIONS OF THE UNITED NATIONS CONVENTION WHICH THE COMMITTEE FOR INVISIBLE TRANSACTIONS (IC) IS NOT QUALIFIED TO GIVE.

(4) AT FIRST SIGHT IT WOULD SEEM THAT BY VIRTUE OF ARTICLE 47 CONTRACTING PARTIES ARE COMMITTED TO IMPLEMENT THROUGH LEGISLATIVE OR OTHER MEASURES THE RESTRICTIVE PRACTICES CONCERNING CONFERENCE MEMBERSHIP AND PARTICIPATION IN CONFERENCE TRADE AS PROVIDED FOR IN ARTICLES 1 AND 2 WHENEVER THE MEMBERS OF THE CONFERENCE DO NOT AGREE ON THESE MATTERS THEMSELVES.

(5) HOWEVER, IT COULD BE THAT THE AUTHORS OF THE UNITED LIMITED OFFICIAL USE

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NATIONS CONVENTION ENVISAGE THAT SETTLEMENT OF SUCH DISAGREEMENT WILL ALWAYS BE OBTAINED THROUGH MANDATORY CONCILIATION UNDER CHAPTER VI, IN WHICH CASE THERE WOULD BE NO NEED FOR GOVERNMENTAL ACTION. YET THE RECOMMENDATIONS RESULTING FROM SUCH CONCILIATION ARE NOT BINDING AS FAR AS THESE CONTESTANTS ARE CONCERNED WHICH ARE NOT ACCEPTING THEM, AND THE COMMITTEE FOR INVISIBLE TRANSACTIONS FINDS IT DIFFICULT TO SEE WHAT HAPPENS WHEN CONCILIATION

UNDER CHAPTER VI FAILS. IT SEEMS UNLIKELY THAT THE DIS-  
PUTE IS LEFT UNRESOLVED; THAT THE CONFERENCE IS LEFT TO  
CARRY ON AS BEST IT CAN UNDER THE STATUS QUO ANTE, THAT  
THERE WILL BE AGREEMENT TO DISAGREE; THAT ONE OR MORE OF  
THE CONTESTANTS ARE EXPECTED TO WITHDRAW EVENTUALLY.  
ARE NOT THE CONTRACTING PARTIES COMMITTED AS A LAST  
RESORT TO SETTLE THE DISPUTE THROUGH IMPLEMENTATION OF  
THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION  
BY GOVERNMENTAL ACTION UNDER ARTICLE 47?

(B) IN THE LATTER CASE THE CONFLICT OF COMMITMENTS

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OUTLINED IN PARAGRAPH (2) ABOVE WOULD ARISE FOR MEMBER  
COUNTRIES OF THE O.E.C.D. WHICH BECOME CONTRACTING  
PARTIES OF THE UNITED NATIONS CONVENTION AND, TAKING THE  
CAUTIOUS VIEW, THE COMMITTEE FOR INVISIBLE TRANSACTIONS  
THEREFORE SUGGESTS THAT IN ORDER TO AVOID THE POSSIBILITY

OF SUCH A SITUATION ARISING THE COUNCIL MIGHT WISH TO RECOMMEND MEMBER COUNTRIES NOT TO SIGN THE UNITED NATIONS CONVENTION OR TO ACCEDE THERETO UNTIL AN AUTHORITATIVE INTERPRETATION HAS BEEN OBTAINED

(A) OF THE MEANING AND SCOPE OF THE GENERAL IMPLEMENTATION PROVISIONS OF ARTICLE 47 OF THE UNITED NATIONS CONVENTION AND OF THE SPECIFIC PROVISIONS CONCERNING ENFORCEMENT OF CONCILIATION RECOMMENDATIONS IN ITS ARTICLE 39, AND

(B) OF THE COMMITMENTS WHICH THESE ARTICLES ENTAIL FOR CONTRACTING PARTIES TO IMPOSE RESTRICTIVE PRACTICES THROUGH LEGISLATIVE OR OTHER MEANS."

2. ABOVE VERSION OF CHAPTER IV RECOGNIZES DIFFICULTIES LIMITED OFFICIAL USE

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INVOLVED IN INTERPRETING PROVISIONS OF UN CONVENTION AND EFFECTIVELY THROWS RESPONSIBILITY FOR INTERPRETATION BACK ON UNITED NATIONS. IT HAS CLEAR ADVANTAGE OF RECOMMENDING THAT OECD MEMBERS NOT SIGN UNTIL QUESTIONS OF INTERPRETATION ARE CLARIFIED, WHICH ULTIMATELY WILL LEAD, IN OUR VIEW, TO SUBSTANTIATION OF IC MAJORITY CONCLUSION THAT CONVENTION IS BOTH MANDATORY AND ENFORCEABLE IN A WAY WHICH WOULD IMPOSE OFFICIAL RESTRICTIONS ON LINER CONFERENCES IN CONTRAVENTION OF LIBERALIZATION OBLIGATIONS UNDER IC CODE.

3. SECRETARIAT APPROACH MIGHT POSSIBLY BE ACCEPTABLE TO ALL MEMBERS OF COUNCIL AND RESULT IN HIGHLY USEFUL RECOMMENDATION TO DELAY SIGNATURE WHILE FURTHER INVESTIGATIONS ARE CARRIED OUT ELSEWHERE. CLEARLY A MAJORITY/MINORITY APPROACH WILL FAIL TO WIN COUNCIL UNANIMITY AND WOULD PERMIT DISSENTING MEMBERS TO REACH OWN CONCLUSIONS REGARDING ADHERENCE TO CONVENTION. MAIN QUESTION THEREFORE, IS WHETHER POSTPONEMENT OF SIGNATURE CAN REALISTICALLY BE EXPECTED, IF (AS IS BY NO MEANS CERTAIN) COUNCIL RECOMMENDS AGAINST SIGNING WHILE FURTHER INTERPRETATION IS AWAITED. CRITICAL QUESTION THEN BECOMES TIME PERIOD NEEDED FOR UNCTAD TO COMPLETE LEGAL DETERMINATION, AND WHETHER THIS WOULD BE PRIOR TO SIGNATURE DEADLINE OF JUNE 30, 1975. WE WOULD APPRECIATE DEPARTMENT'S ESTIMATE CONCERNING TIMING AND POSSIBLE OUTCOME OF UNCTAD REVIEW.

4. IT ALSO IS CLEAR FROM SECRETARIAT FORMAT THAT IC WILL NOT HAVE GIVEN DECISIVE ANSWER TO QUESTION POSED IN COUNCIL MANDATE REGARDING DETERMINATION OF COMPATIBILITY BETWEEN CONVENTION AND CODE. GOVERNMENTS WOULD NOT, THEREFORE, HAVE BENEFIT OF MAJORITY/MINORITY VIEWS IN MAKING DECISIONS ON SIGNATURE, UNLESS PERHAPS THESE COULD BE ANNEXED TO IC REPORT.

5. MISSION WOULD APPRECIATE DEPARTMENT'S REACTIONS TO  
SECRETARIAT VERSION OF CHAPTER IV AND TO ABOVE COMMENTS  
IN TIME FOR OPENING OF BUSINESS FRIDAY. SEPTEL REPORTS  
ON DEVELOPMENTS AT IC MEETING NOV. 6-8 AND WILL INCLUDE  
LATEST DRAFT OF CHAPTER IV MAJORITY VIEW (ANOTHER IS  
ALREADY UNDERWAY).  
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## Message Attributes

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